TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. 1068 5317 419

THE PACIFIC EXPRESS COMPANY, PLAINTIFF IN [illegible]

vs.

P. P. PICKARD, COMPTROLLER OF THE STATE OF TENNESSEE, AND THE STATE OF TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF [illegible]

FILED SEPTEMBER 10, [illegible]

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P. P. PICKARD, COMPTROLLER OF THE STATE OF TENNESSEE, AND THE STATE OF TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1083.

THE PACIFIC EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

P. P. PICKARD, COMPTROLLER OF THE STATE OF TENNESSEE, AND THE STATE OF TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

INDEX.

	Original.	Print.
Caption	1	1
Petition for writ of error	2	1
Order allowing writ of error	5	2
Writ of error	6	2
Citation and proof of service of same	8	3
Bond	10	3
Transcript from circuit court of Shelby county	13	4
Cost bond	13	4
Summons	14	4
Declaration	15	5
Plea	22	7
Agreed statement	22	7
Judgment	27	8
Order denying new trial and granting appeal	29	9
Agreement as to appeal, &c.	29	9
Judgment	31	9
Clerk's certificate	33	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 3, 1888.

1 P. P. PICKARD, Compt., vs. PACIFIC EXPRESS CO. } # 1084, Shelby Law Docket.

From the Supreme Court of Tennessee, at Jackson.

Att'y Gen'l G. W. Pickle, for plaintiff; Morgan & McFarland, for defendant.

2 P. P. PICKARD, State Compt., vs. PACIFIC EXPRESS CO. } # 1084, Shelby Law Docket.

To the Hon. Peter Turney, chief justice of the supreme court of Tennessee:

Your petitioner, The Pacific Express Co., the defendant in error in the above cause, would respectfully represent unto your honor that at one of the days of the term of the supreme court of said State, held at Jackson, Tennessee, beginning on the first Monday in April, 1888, the said supreme court, over which your honor presides, rendered a decision against your petitioner in the above-stated cause reversing the judgment of the circuit court of Shelby county.

3 Your petitioner would represent that there was involved in said cause a provision of the Constitution of the United States, to wit, article 1, section 8th, of said Constitution, commonly known as the provision of said Constitution giving to Congress the power to regulate commerce between the States; and by said judgment, which was based on an agreed statement of facts shown in the record, the said Pacific Express Co., your petitioner, was held liable for a privilege tax of one thousand dollars per annum under an act of the Legislature of the State of Tennessee passed June the 12th, 1885; and your petitioner represents that it is not liable for said tax, as it will be seen by the record that as an express company it does exclusively an interstate-commerce business and no State

4 business whatever; all of which will appear from said record; and that the judgment against petitioner is therefore violative of art. 1, sec. 8, of the Constitution of the United States; and that said judgment was rendered against petitioner on behalf of the plaintiff in error, P. P. Pickard, comptroller of the State of Tennessee, and in behalf of said State; and that said State is not entitled to collect any tax whatever from this petitioner for doing an interstate business, and that said petitioner, against whom said judgment is rendered, is entitled to have the same reviewed by the Supreme Court of the United States.

Therefore your petitioner prays that your honor endorse an

5 allowance of a writ of error, and that proper citation be signed by your honor, to the end that the record and proceedings in said cause may be removed into the Supreme Court of the United

States, to the end that said error may be corrected; and petitioner, as in duty bound, will ever pray, &c.

MORGAN & McFARLAND,
Att'ys for Pacific Express Co.

STATE OF TENNESSEE, AT JACKSON, *May 28th*, 1888.

The writ of error prayed for in the foregoing petition is granted and allowed in pursuance of law in such cases. The petitioner will execute a pro. bond in the sum of five hundred dollars, to be approved by me.

P. TURNEY,
Chief Justice.

(Endorsed:) Filed May 29th, 1888. Jno. W. Buford, clerk.

6 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court, before you, between The State of Tennessee and P. P. Pickard, State comptroller thereof, plaintiffs, and The Pacific Express Company, defendant, a manifest error hath happened, to the great damage of the said Pacific Express Company, as by complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1888, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Samuel F. Miller, senior justice of the Supreme Court of the United States, and the seal of the United States circuit court, at Memphis, this 28th day of May, A. D. 1888, and 112th of American Independence.

{ Seal of the Circuit Court of the United States for the District of West Tennessee. }

JOHN B. CLOUGH, *Clerk.*

Filed with me June 8th, 1888.

JNO. W. BUFORD, *Clerk.*

7 [Endorsed:] No. —. Circuit court of the United States, western district of Tennessee. The State of Tennessee, P. P. Pickard, comptroller, *vs.* The Pacific Express Company. Writ of error. Issued the 28 day of May, A. D. 1888. John B. Clough, clerk.

8 *Citation.*

The United States of America to P. P. Pickard, comptroller of the State of Tennessee, and to the State of Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Tennessee, at Jackson, wherein P. P. Pickard, State comptroller, is plaintiff in error and Pacific Express Company is defendant in error, and show cause, if any there be, why the judgment rendered against the said defendant in error in the writ of error mentioned should not be corrected & why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Peter Turney, chief justice of the supreme court of Tennessee, this 28th of May, 1888.

P. TURNEY,
Chief Justice.

Service of the above citation acknowledged for P. P. Pickard, State comptroller, and the State of Tennessee.

May 28th, 1888.

G. W. PICKLE,
Att'y Gen'l for State of Tennessee.

9 [Endorsed:] Citation. P. P. Pickard, &c., *vs.* Pacific Express Co. Filed May 29th, 1888. Jno. W. Buford, cl'k.

10 *Writ of Error Bond.*

THE STATE OF TENNESSEE *et al.*
v.
THE PACIFIC EXPRESS CO.

Know all men by these presents that we, The Pacific Express Company and R. J. Morgan, are held and firmly bound unto The State of Tennessee and P. P. Pickard, comptroller of said State, in the sum of five hundred dollars, to be paid to the said State and State comptroller; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, firmly by these presents.

Signed, sealed with our seals, and dated this 28th day of May, A. D. 1888.

11 The condition of this obligation is such that whereas the above-named Pacific Express Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgement rendered in the above-entitled action by the supreme court of Tennessee:

Now, therefore, if the above-named Pacific Express Company shall prosecute the said writ of error to effect and answer all costs

and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

PACIFIC EXPRESS COMPANY,
By MORGAN & McFARLAND.
R. J. MORGAN, *Surety.*

Acknowledged before me, at my office, in Memphis, Ten-
12 nessee, this May 28th, A. D. 1888, and I hereby certify that R. J. Morgan, surety in the foregoing bond, is sufficient for the amount of the penalty thereof.

JNO. B. CLOUGH,
Clerk of the Circuit Court of the United States for the Western District of Tennessee, as Witness the Seal of said Court.

This bond is hereby approved.

P. TURNEY,
Chief Justice of the Supreme Court of the State of Tennessee.

(Endorsed:) Filed June 8th, 1888. Jno. W. Buford, cl'k.

13 STATE OF TENNESSEE:

At a term of the circuit court of Shelby county, begun and held at the city of Memphis or taxing district of Shelby county, at the court-house, on the third Monday of March, 1887—present and presiding, Hon. L. H. Estes, judge, &c.; also present, Daniel Schloss, clerk of said court, and W. D. Cannon, sheriff of Shelby county—when the following proceedings were had, to wit:

Cost Bond.

PACIFIC EXPRESS COMPANY, *vs.* P. P. PICKARD, Comptroller, &c. } 4811, A. D.

I bind myself to the defendant in the sum of two hundred and fifty dollars for the successful prosecution of this action, to be void on condition that I pay all the costs which may at any time
14 be adjudged against the plaintiff in the event that plaintiff shall not pay the same; otherwise to remain in full force.

Witness my hand this 30th day of March, 1886.

R. J. MORGAN. [SEAL.]

Summons.

State of Tennessee to the sheriff of Shelby county, Greeting:

You are hereby commanded to summons P. P. Pickard, comptroller of State of Tennessee, if to be found within your county, personally to be and appear before the judge of the circuit court of Shelby county, at a term of said court to be held for said county, at the court-house, in the city of Memphis, on the third Monday in

May next, and there to answer the Pacific Express Company
15 in an action on this case to its damage in the sum of three thousand dollars for license tax paid under protest.

Herein fail not, and have you then and there this writ.

Witness Joseph Uhl, clerk of said court, at office, the third Monday in March, 1886.

JOS. UHL, *Clerk.*

Endorsed: Issued 30th day of March, 1886. Jos. Uhl, clerk. Service acknowledged March 31, 1886. P. P. Pickard, comptroller.

Declaration. Filed April 27th, 1886. *Geo. J. Campbell, D. C.*

In the Circuit Court of Shelby County.

PACIFIC EXPRESS COMPANY *vs.* P. P. PICKARD, Comptroller. } 4811, A. D.

16 The Pacific Express Company, a corporation chartered by the laws of the State of Nebraska, sues the defendant, P. P. Pickard, the comptroller of the State of Tennessee, for the sum of two thousand and eighty dollars, with interest from March 18th, 1886, for that, whereas on said last date, to wit, March 18th, 1886, the State of Tennessee, through the comptroller, the said defendant, P. P. Pickard, claimed and demanded of the said plaintiff that it was indebted to the said State the above sum, to wit, the sum of 2,080.00, as follows: For State privilege tax for the year 1885, the sum of $1,000.00; for privilege tax for the year 1886, the sum of $1,000.00; interest on the tax, 1885, $70.00; interest on tax, 1886, 10.00, making in the aggregate the sum of $2,080.00,
17 which said sum of money was demanded by the said defendant of the plaintiff. The plaintiff further charges that the said defendant proceeded to collect the same, and was attempting to collect the same under process of law; whereupon the said plaintiff paid the same under protest, as the plaintiff had the right to do under sections 926 *et seq.* of code (M. & V.); wherefore plaintiff brings suit for the same under said sections of the code against the defendant. The plaintiff charges that said taxes for the years 1885 and 1886 and the interest thereon are illegal and void, and that the said plaintiff is not liable to the State for the same.

Plaintiff charges that it is a foreign corperation not amenable to the laws of Tennessee; that it has an office in the city of
18 Memphis, in said State, solely for the doing exclusively an interstate business; that it collects freight from and in other States and brings the same into the State of Tennessee solely for delivery to the citizens of Tennessee, and that it collects freight merchandize in Memphis and transport- the same into other States for delivery to their citizens, and that it collects and delivers no freight from and to the citizens of the State of Tennessee; that it is doing exclusively an interstate commerce; that — has no other office in

Tennessee except the general office in the city of Memphis, where freights are collected for foreign States and where freights are delivered from foreign States. Plaintiff charges that the tax which is imposed by the State of Tennessee and
19 as above set out is claimed to be a tax on the privilege of plaintiff's doing business in the State of Tennessee, which plaintiff charges is illegal and void and contrary to the Constitution of the United States, art. 1, sec. 8, and that said tax is an attempt to regulate commerce between the States, which right belongs exclusively to the legislative department of the United States.

The plaintiff further shows that when the said tax was demanded and was about to be collected under process of law it gave the following notice to the said defendant, P. P. Pickard, comptroller of the State of Tennessee, in the following words and figures, to wit:

MEMPHIS, TENN., *March 16th*, 1886.

To P. P. Pickard, comptroller:

20 Take notice that the privilege tax you are now collecting against the Pacific Express Co. for the years 1885 & 1886 to the amount of two thousand dollars, one thousand dollars for each year, together with the cost and penalties upon the same, is unjust and illegal and against the Constitution of the United States and the State of Tennessee, and we do hereby protest against the payment of the same, and hereby give you notice that we will sue for the recovery of the same under the statute of Tennessee. We make this payment under protest.

(Signed) PACIFIC EXPRESS COMPANY,
By W. J. BROWN, *Agent.*

But said defendants, not regarding said protest, demanded
21 said tax, as above set forth, to wit, the sum of $2,080.00, and was proceeding to collect the same under the statutes of the State; whereupon said pl'ff paid said illegal and unjust tax to the comptrollor, the def't; whereupon the said defendant gave plaintiff a receipt for the same substantially as follows, to wit:

Pacific Express Company to State of Tennessee, Dr.

For State privilege tax, 1885	$1,000 00
" " " " 1886	1,000 00
" int. on tax, 1885	70 00
" " " 1886	10 00
	$2,080 00

Received payment March 18th, 1886, under protest, and paid into the treasury on R. Wt. No. 8819.

(Signed) P. P. PICKARD,
Comptroller.

Which said receipt and notice of which will be shown in
22 evidence upon the trial of this cause. Wherefore the said plaintiff sues the defendant for the said amount above set fourth, and claims that the defendant has — damaged to the am't of three thousand dollars.

MORGAN & McFARLAND,
Att'y- for Pl'ff.

Plea. Filed April 27th, 1886. *J. T. Tomlinson, D. C.*

The defendant for plea says he is not guilty of the matters in the plaintiff's declaration alleged.

BENJ. J. LEA,
Att'y for Defendant.

Agreed Statement. Filed April 27th, 1886. *Geo. J. Campbell, D. C.*

23 In the Circuit Court of Shelby County.

PACIFIC EXPRESS COMPANY
vs.
P. P. PICKARD, Comptroller of the State of Tennessee. } 4811, A. D.

Agreed statement of facts in the above case.

It is agreed that the Pacific Express Company is a corporation chartered by the laws of Nebraska to do a general express business; that said express company is doing an express business in the States of Nebraska, Kansas, Missouri, Arkansas, and Texas; that said express company has an office in the city of Memphis; that it has no other office in the State of Tennessee; that said express company operates the railroad lines of the Kansas City rail-
road and the Memphis and Little Rock railroad from their
24 terminal points in the city of Memphis to and across the Mississippi river.

That all the freight of every description that said express company distributes in the city of Memphis and State of Tennessee is freight brought from other States, and that no freight is collected or received inside of the State of Tennessee to be distributed in Tennessee; that there is no other receiving or distributing point inside the State of Tennessee but the general office in the city of Memphis, which office is established and used to do only an interstate business.

It is further agreed that the Pacific Express Company gathers up its freight in the city of Memphis by express wagons, to be shipped over the lines of the railroads above mentioned, and that
25 all this freight is shipped beyond the State of Tennessee into other States and none delivered inside of the State of Tennessee, and that it does not do any domestic business whatever except receiving freight and charges and freight for distribution, as above stated.

It is further agreed that the Pacific Express Company is purely an express company and a carrier of merchandise of every description; that it does no other business except the express business; that it has an agent in the city of Memphis, and that it uses wagons for the collecting and distributing as above specified and not for domestic business.

It is further agreed that by general act of the Legislature
26 the State of Tennessee charges a license tax upon express company with lines less than one hundred miles — $1,000.00 per annum, and that the statutes fixing the rate may be used in evidence, and that the lines over which the Pacific Express Company does business in Tennessee is less than one hundred miles, and the only lines in Tennessee is from the railroad depot to without city limits, the nearest point they can cross the river into Arkansas and opposite city of Memphis.

It is further agreed that the State of Tennessee, through the comptroller, P. P. Pickard, collected from the Pacific Express Company on March 18th, 1886, privilege tax for the years 1885 the sum
27 of $1,000.00, and interest on the same $10.00, making in all $2,080.00; that said tax was collected by compulsion by the comptroller of the State and under due process of law, and that the Pacific Express Company protested in proper form against the payment of said sum of money, and paid the same to the comptroller under protest. The parties may file the protest and the receipt of the comptroller as part of this agreement, and that the suit for the recovery of the tax paid under protest was begun within thirty days from the time of payment, April 12th, 1886.

P. P. PICKARD, *Compt.*

And on, to wit, Saturday, April 30th, 1887, March term, 1887:

28 PACIFIC EXPRESS COMPANY
vs.
P. P. PICKARD, Comptroller of the State of Tennessee. } 9085, T. D.

Came the parties, by their attorneys, and this being a non-jury case, the issues joined were tried by the court upon an agreed statement of facts, and having heard the evidence, the court finds for the plaintiff and assesses its damages at $2,000.00, the amount paid by the plaintiff to the defendant under protest, and the further sum of $80.00, interest thereon.

It is therefore considered by the court that the plaintiff recover of the defendant the said sum of two thousand dollars principal and eighty dollars interest; also the State and county tax and all cost herein, for which let execution issue.

29 *Order Overruling, &c. April 30th, 1887.*

PACIFIC EXPRESS COMPANY
vs.
P. P. PICKARD, Comptroller, &c. } 9085, T. D.

Motion having been made by the State, through P. P. Pickard, comptroller, for new trial in the above cause, and the same having been considered by the court, said motion is overruled, and the said P. P. Pickard, on behalf of the State, prays an appeal to the present term of the supreme court, being held at Jackson, which appeal is granted by the court without bond.

Agreement.

We agree that the record shall immediately be made out
30 by the clerk and the appeal taken to the present term of the supreme court, and that bill of exceptions need not be signed and is hereby waived.

MORGAN & McFARLAND,
For Plaintiff.

31 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State for the western division thereof, at Jackson, at the April term, A. D. 18–8—present, the Hon. Peter Turney, chief justice, and D. L. Snodgrass, H. H. Lurton, W. C. Caldwell, and W. C. Folkes, associate judges—when the following proceedings were had, to wit:

P. P. PICKARD, Comp't,
vs.
PACIFIC EXPRESS CO. } #1084, Shelby Law Docket.

MONDAY, *May 28th*, 1888.

This cause was heard upon the transcript of the record from the circuit court of Shelby county, and after argument by counsel and full consideration had, this court is of opinion, upon the agreed
32 facts in the record upon which the case is heard, that the defendant in error has failed to show that the imposition upon it of the said privilege tax on account of the express business done by it within the limits of the State of Tennesse, is a violation of article 1, section 8, of the Constitution of the United States, conferring upon the Congress of the United States power to regulate commerce among the States, and that the facts in the record do not bring the defendant in error within the protection of said provision of the Constitution of the United States, this court being of opinion that said privilege tax is not a regulation of commerce and not forbidden
33 by the aforesaid clause of said Constitution of the United States.

It is therefore considered by this court that said judgment of the circuit court of Shelby county be reversed, vacated, and annulled, and that plaintiff in error recover of defendant in error the costs of this cause, for which execution may issue.

THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect, and complete copy of the record & judgment pronounced by said court at its April term, 1888, in the case of P. P. Pickard, comp't, against Pacific Express Co., as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in the city of Jackson, on this the 15th day of August, A. D. 1888, and of the Independence of the United States the 113th year.

[Seal Supreme Court of Tennessee, Western Division, Jackson, Tenn.]

JNO. W. BUFORD, *Clerk*,
By ROB'T LINDSEY, *D. C.*

Endorsed on cover: Tennessee sup. court. No. 1083. The Pacific Express Company, plaintiff in error, *vs.* P. P. Pickard, comptroller of the State of Tennessee, & The State of Tennessee. Filed September 10, 1888.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

PACIFIC EXPRESS COMPANY, Appellant,

419 Law } vs.

P. P. PICKARD, Comptroller, and the State of Tennessee.

BRIEF OF R. J. MORGAN AND L. B. MCFARLAND FOR APPELLANT.

STATEMENT.

The only facts necessary to an understanding of the question involved, are as follows:

Under an Act of the Legislature of Tennessee, passed March 30, 1883, Ch. 106, Sec. 4 (Code of Tenn. Sec. 617 M. & V. Ed.) a license tax of $1000 per annum is charged upon Express Companies with lines of less than 100 miles.

This tax of $1000 per annum was collected by the Comptroller of the State of Tennessee for the years 1885 and 1886, amounting to $2080, tax and interest, from the Pacific Express Company, which paid same under compulsion and protest.

This suit was then brought by the Pacific Express Company to recover this $2080 so paid. Under Sections 926 et seq., Code of Tennessee, M. & V. Ed., such suits may be maintained for the recovery of taxes so paid.

The Pacific Express Company is a corporation chartered by the laws of Nebraska.

Its only business in the State of Tennessee is to transport goods and merchandise from other States into the State of Tennessee, and to transport goods and merchandise from this State into other States.

It has an office in the city of Memphis, with the usual property of Express Companies, for receiving and distributing freight. This property, which it owns, is subject to taxation, and it has paid the regular tax assessed against it.

There is no receiving and distributing of goods within the State of Tennessee. All the goods that are received by the Company are for distribution out of this State. And all the goods that are distributed in this State are brought from other States.

ARGUMENT.

The question is purely a question of Inter-State Commerce, and, as we think, falls under Art. 1, Sec. 8, of the Constitution of the United States; and the error complained of is that the Supreme Court of Tennessee held that it did not fall under this provision of the United States Constitution.

It would seem that the cases of Robbins v. Shelby Taxing District, 120 U. S. p. 489, and Leloup v. Port of Mobile, 127 U. S. p. 640, were absolutely conclusive of this case. Yet, the present class of cases to which this belongs is sought to be excluded from this rule.

In Mobile v. Kimball, 102 U. S. 691, commenting upon the commercial clause in the Federal Constitution, the court says:

"The subjects, indeed, upon which Congress can act under this power, are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are National in their character and require uniformity of regulation, affecting alike all the States. Others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States, which consists in *transportation*, purchase, sale and exchange of commodities. Here there can, of necessity, be only one system or plan of regulation, and

that Congress can alone prescribe. Its non-action in such cases, with respect to any particular commodity or *mode* of *transportation*, is a declaration of its purpose, that the commerce in that commodity, or that by that means of transportation shall be free."

In the case of Robbins vs. Shelby County, *supra*, the court says: "It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by the State laws, is when, by virtue of its police power and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons and the protection of property, or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities. The passage of inspection laws to secure the due equality and measure of products and commodities. The passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community. The imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein not directly connected with foreign or inter-State commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States. And the imposition of taxes upon all property within the State mingled with and forming part of the great mass of property therein, * * * and no discrimination can be made by any such regulation adverse to the persons or property of o her States, and no regulation can be made directly affecting inter-State commerce."

In the case of Welton vs. Missouri, 91 U. S., the court says: "The power to regulate conferred by that clause upon Congress, is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed—that is, the condition upon which it shall be conducted; to determine how far it shall be free

and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited. Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the *transportation*, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries and between the citizens of different States. The power to regulate it embraces all the instruments by which commerce may be conducted."

The same doctrine is clearly announced in the case of Pensacola Telegraph Co. vs. West. Un. Tel. Co., 96 U. S. 1.

In laying this tax it is immaterial whether it be on the merchant or his agent, on his goods, which are to be sold or transported, on the vehicle of transportation or the various other instrumentalities, animate or inanimate, by means of which commerce is carried on.

The tax may be called a head tax, a vocation tax, a privilege tax, a tax on tonnage, a tax on the amount of business done, etc., etc. It all, however, in one form or another, is a regulation of commerce.

Ward vs. Maryland, 12 Wall. 419.
Passenger Cases, 7 How. 283.
Almy vs. California, 24 How. 169.
State Freight Tax Cases, 15 Wall. 215.
Welton vs. State, 91 U. S. 275.
Moran vs. New Orleans, 112 U. S. 69.
Walling vs. Michigan, 116 U. S. 446.
Pullman Car Co. vs. Pickan, 117 U. S. 34.

It thus appears that the power of Congress to regulate commerce, is *exclusive* upon subjects of a National importance and character, requiring uniformity of regulation.

The distinction of these cases above cited, and particularly those from which extracts are drawn in this brief, is made upon

the exclusive subjects of a National importance, requiring uniformity of regulation, and those cases in the books where the State exercises its power under what is called its police power.

There is a class of cases recognized by the courts where the States have jurisdiction of the matter in the absence of Federal legislation, but it must be in the absence of legislation, and such as affects the public safety or health.

Pilotage is one, under certain circumstances.

102 U. S. 572.

12 Howard 299; 13 Wall. 236.

Bridges and dams.

107 U. S. 678.

95 U. S. 459.

113 U. S. 208.

Harbor improvements. The placing of buoys and beacons, the removing of obstructions, erection of wharves, &c. These are under the police power of the State. Such, also, are harbor regulations, wharves and manner of discharging freight, &c.

102 U. S. 691. 105 U. S. 559. 21 Howard 184.

Wharfage, but not duty on tonnage, but mere wharfage, may may be regulated without discrimination.

121 U. S. 444.

107 U. S. 691.

105 U. S. 559.

Regulation of Carriers, by compelling railroads to fence and guard their tracks, provide suitable buildings for depot purposes, and that class of regulation. These come under the police power of the State.

17 Wall. 560.

Cooley Constitutional Lim. 579.

Sanitary and inspection laws fall within the power of the State.

101 U. S. 38.

11 Peters 102.

Many other subjects that are within the power of the States under their police powers, may be legislated upon in the absence of legislation by the Federal Government.

This latter class of cases does not apply to our controversy. The legislature of Tennessee proposes a tax upon our business, which is purely inter-State commerce. And it makes no difference whether it be a tax upon our receipts, our tonnage or privilege tax, it is a tax upon the busiuess. And it was so held in the case of Robbins vs. the Taxing District. That case was a privilege tax case.

In the case of Fargo vs. Michigan, 121 U. S. 230, the court held that the States cannot be permitted, under the guise of a tax upon business transacted within their borders, to impose a burden upon commerce among the States, when the business so taxed is itself inter-State commerce.

Vessels, cars, locomotives and other instruments of commerce, may be taxed as other property in the State, when they are owned or registered in the State, though engaged partly or wholly in inter-State commerce, but no license or other tax can be imposed on them for the privilege of entering or doing business in the ports of another State, or of transporting freight or passengers therein, so far as such transportation relates to inter-State commerce.

In the case of Pullman Car Co., 117 U. S. 34, when the car is owned in one State, and does both State and inter-State transportation, the fact of the inter-State transportation prevents the taxation. This was a privilege tax case as other cases were.

114 U. S. 119.
107 U. S. 365.

Many other cases could be cited to the same effect.

In our case the Pacific Express Company is a non-resident corporation, as the facts show, and comes directly within the decision of the Drummers' Tax Case. This, however, would make

no difference, if they be engaged in inter-State commerce. The property used might be taxed as other property if it was owned and used exclusively in the State, but not the right as a privilege.

It is thoroughly settled by the Supreme Court of the United States in several of the cases we have cited, and in many others, that a State cannot levy a tax on the citizens of foreign countries coming to this country, nor of citizens of other States coming into its limits. But would not the State, by indirection do what it cannot do directly, if it were permitted to declare any offer on the part of the foreigner or citizen of other States to have any dealings with its own citizens a privilege? The mere coming into the State by the non-resident citizen or by its agent is futile unless he can have *intercourse—commerce* with its citizens.

Hence, to give the full benefit of that freedom of intercourse which Congress has willed that he should enjoy (by failing to restrict or impose regulations upon it), he should be protected from any imposition by the State while engaged in inter-State commerce. This view was taken by Mr. Justice Bradley in Ward vs. Maryland supra, and the Chief Justice and Mr. Justice Clifford in case of Crandall vs. Nevada 6 Wall. 35, and the opinion of the court in the State freight cases supra, also Phil. Steamship Co. vs. Penn. 122 U. S. 326.

The case of Osborne vs. Moblile, 16 Wall. 479, has been relied upon as sustaining the power of the State to levy tax upon agencies that come into the State to do business. This case does not stand in our way. The Southern Express Company which was the party taxed in the Osborne case, did business not only as inter-State commerce, but also purely State business besides. It sought to be released because it did inter-State business also.

The Chief Justice delivering the opinion, called attention to the two classes of cases, one doing business both State and inter-State commerce, and the other purely inter-State, holding that the Osborne case fell within the first class and liable.